He v. Gonzales, No. 03-72312 (Pasadena – May 6, 2005)

BYBEE, J., DISSENTING:

I cannot join the majority opinion. The majority concludes that He's ineffective assistance claim was properly before the BIA, even though the BIA had already denied a motion to reopen on this ground and He failed to appeal that BIA's ruling. I respectfully disagree.

Our cases recognize equitable tolling in cases of ineffective assistance of counsel. However, He and his current counsel, Wayland, had to have been aware of Portnoy's ineffective assistance because He filed a motion to reopen on this ground in January of 2002. This motion was denied by the BIA on April 29, 2002. He never appealed this ruling, and therefore waived his right to an appeal. I am unaware of any case, besides this one, where this Court has applied the doctrine of equitable tolling *after* a litigant has already raised his claim.

He had an opportunity to assert his ineffective assistance of counsel claim, and he did so. The BIA rejected his argument as untimely. Because He did not appeal the BIA's decision, we lack the jurisdiction to consider the validity of He's claim three years later. *See* 8 U.S.C. § 1252(b)(1); *Stone v. INS*, 514 U.S. 386 (1995) ("Judicial review provisions . . . are jurisdictional in nature . . . ."). The only way He's claim would be preserved would be if He's *current* counsel's failure

to appeal the BIA's prior ruling constituted ineffective assistance of counsel—an argument that no one has made. The rationale of the majority opinion seems to allow a petitioner to raise arguments indefinitely, essentially granting petitioner an unlimited window in which to assert his claims. I am unaware of any other area in our jurisprudence where such a perpetual right exists.

I therefore believe that He's failure to appeal the BIA's previous denial of his ineffective assistance of counsel claim precludes us from considering this claim now. I would deny He's petition. I respectfully dissent.